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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

NICHOLAS R. FINO, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 5

1.) The Decision Below Raises Significant Questions as to the Constitutionality of Title 18 U. S. C. 2510, *et seq.* Which Conflict with Prior Decisions Of This Court; Also, There Is A Conflict Between Various Circuit Courts As To The Validity Of The Authorization Procedures Used To Obtain The Wiretaps 5

2.) In Establishing Probable Cause For The Issuance Of The Intercept Orders, Reliance Was Had Upon The Statutory Presumption Contained In § 1955 Of Title 18, Which Presumption Is Unconstitutional 12

Conclusion 14

Appendix A—Opinion In The Court Below 15

Appendix B—Constitutional Provisions 23

Appendix C—Statutes Involved 24

CITATIONS.

CASES:

Berger v. New York, 388 U. S. 41 (1967) 6, 7
Boyd v. United States, 116 U. S. 616 (1886) 7
Draper v. United States, 358 U. S. 307 (1959) 8
Gouled v. United States, 255 U. S. 298 (1921) 7
Katz v. United States, 389 U. S. 347 (1967) 6, 7

II.

PA

Leary v. United States, 395 U. S. 6 (1969) 12,
Marron v. United States, 275 U. S. 192 (1927) .....
Osborne v. United States, 385 U. S. 323 (1966) 6,
Stanford v. United States, 279 U. S. 476 (1965) .....
Tot v. United States, 319 U. S. 463 (1943) 12,
United States v. Aquino, 338 F. Supp. 1080 (E. D. Mich. 1972) .....
United States v. Baldassari, 338 F. Supp. 904 (M. D. Pa. 1972) .....
United States v. Becker, 461 F. 2d 230 (2d Cir., 1972) ..
United States v. Casale, 341 F. Supp. 374 (M. D. Pa. 1972) .....
United States v. Ceraso, 467 F. 2d 647 (3rd Cir., 1972)
United States v. Chavez, Case No. 72-2240, (9th Cir., 1973), Cert. granted May 21, 1973 (not reported yet)
United States v. Cihal, 336 F. Supp. 261 (W. D. Pa. 1972) .....
United States v. Cox, 449 F. 2d 679 (10th Cir., 1971) ..
United States v. Fiorella, 468 F. 2d 688 (2d Cir., 1972)
United States v. Focarile, 340 F. Supp. 1033 (D. C. Md. 1972) .....
United States v. Gainey, 380 U. S. 63 (1965) 12,
United States v. Giordano, 469 F. 2d 522 (4th Cir., 1972), Cert. granted ____ U. S. ____, 36 L. Ed. 2d 194 (1973) .....
United States v. Pisacano, 459 F. 2d 259 (2d Cir., 1972)
United States v. Robinson, 468 F. 2d 189 (5th Cir., 1972) remanded by the Circuit Court *en banc* for hearing as to facts surrounding authorization procedures, 472 F. 2d 973 (5th Cir., 1973) 9,
United States v. Romano, 382 U. S. 136 (1965) 12,

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THE UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Nicholas R. Fino, Rosalie Lauricella Fino, Joseph M. Giallella, Nicholas Alberti, Anthony J. Tripi, Gaetano C. Agro, and Joseph Randazzo, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 1, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Western District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Seco Circuit was entered on May 1, 1973. A timely petition f certiorari was filed within thirty days of that date. T Court's jurisdiction is invoked under 28 U. S. C. 1254(and pursuant to the provisions of Rule 19 subdivision 1(of the Supreme Court Rules in that the petitioners ha asserted in the Court below and assert here, a deprivati of their rights, privileges and immunities secured by t Constitution of the United States as well as the fact that t United States District Court and the United States Co of Appeals for the Second Circuit have decided an i portant question of federal law, which apparently has n been but should be settled by this Court as well as the f that the Court of Appeals has decided an important qu tion of federal law in a way which is in conflict with ap cable decisions of this Court.

Jurisdiction in the United States District Court for Western District of New York was invoked pursuant to U. S. C. 1331, 1343, as well as the fact that jurisdiction v invoked in the District Court on the further theory that action filed therein was one within the purview of the ju diction of the said District Court without any requirem as to diversity of citizenship and without any requirem as to amount in controversy.

Questions Presented

1.) Whether Title 18 U. S. C. § 2510, *et seq.*, relating the interception of oral communications is constitutio as well as in conflict with prior decisions of this Court.

2.) Whether the procedures which were employed obtaining the authorization to eavesdrop on certain t

phones were proper and in accordance with Title 18 U. S. C. § 2510, *et seq.*

3.) Whether the statutory presumption contained in Title 18 U. S. C. 1955 is constitutional.

Constitutional Provisions Involved

This case involves the Fourth and Fifth Amendments of the United States Constitution relating to searches and seizures and due process, respectively.

Statutory Provisions Involved

Title 18 U. S. C. 1955 (see Appendix B).

Title 18 U. S. C. 2516 (see Appendix B).

Title 18 U. S. C. 2518 (see Appendix B).

Statement of the Case

The petitioners were charged in a two-count indictment with conspiring to violate § 1955 of Title 18 U. S. C. by conducting an illegal gambling business in violation of Title 18 U. S. C. 371 and with a substantive violation of § 1955.

Trial of the indictment began before the Hon. John O Henderson in the Western District of New York on April 18, 1972, and ended in a verdict on May 9, 1972. Petitioners Nicholas R. Fino, Rosalie Lauricella Fino, Joseph M Giallella, Nicholas Alberti, and Anthony J. Tripi, were convicted on both counts of the indictment. Petitioners Gaetano C. Agro and Joseph Randazzo, were acquitted o the conspiracy but convicted of the substantive violation.

On July 3, 1972, Nicholas R. Fino was sentenced to three years' imprisonment and ordered to pay a $30,000.00 fine Rosalie Lauricella Fino was sentenced to two years' proba

tion; Joseph M. Giallella was sentenced to eighteen month
imprisonment; Nicholas Alberti was sentenced to eightee
months' imprisonment; Gaetano C. Agro was sentenced t
two years' probation; Joseph Randazzo was sentenced t
eighteen months' imprisonment and ordered to pay
$5,000.00 fine.

On July 10, 1972, petitioner Anthony J. Tripi was se
tenced to eighteen months' imprisonment and ordered
pay a $10,000.00 fine.

For the most part, the relevant facts are undispute
and, are therefore set forth in summary fashion.

Sometime prior to April 6, 1971, F. B. I. Special Age
Joseph E. Griffin, Jr. was advised by three alleged reliab
confidential informants that Nicholas R. Fino and othe
were conducting a bookmaking operation in the Buffa
New York area.

On April 7, 1971, telephones located in the Fino home a
a telephone in the home of one, Angela Tomaselli, w
tapped pursuant to an order issued by the Hon. John
Henderson of the Western District Court of New York.
April 23, 1971, the telephone in the home of the petitio
Agro was tapped pursuant to a second order issued
Judge Henderson. The telephone taps resulted in a seiz
of numerous conversations involving the placing of bets
horse races.

On May 16, 1971, F. B. I. agents conducted phys
searches of the residences and persons of Fino, Gialle
Alberti and Agro, pursuant to search warrants issued
previous day by Judge Henderson. Telephones, pers
telephone directories, personal papers and money w
seized and introduced at the trial.

Aside from the fruits of the searches which were not of great significance, the government proof consisted of the testimony of several co-conspirators who were not named as defendants, and, sixty-eight reels of tape containing conversations seized on the telephone taps, among other items of evidence.

Many of the telephone conversations played for the jury clearly involved wagering which was illegal in New York State. These taped conversations evidencing illegal gambling supported the conviction under Title 18 U. S. C. 1955.

REASONS FOR GRANTING THE WRIT

1.) The Decision Below Raises Significant Questions as to the Constitutionality of Title 18 U. S. C. 2510, *et seq.*, Which Conflict With Prior Decisions Of This Court; Also, There Is A Conflict Between Various Circuit Courts As To The Validity Of The Authorization Procedures Used To Obtain The Wiretaps.

There can be no question but that the validity of the wiretap orders are of central significance in this case. Without them, the government, by its own admission, could not have made a case. From the taps flowed the search warrants. Through the taps the government identified certain co-conspirators who later testified on the trial against the petitioners. Seized calls were played during the testimony of almost every important witness. Finally, it was through analysis of the calls that the government expert was able to identify the existence of an illegal off-track betting enterprise.

The Court should consider whether § 2518 of Title 18 U. S. C. sufficiently restricts the power of the government secretly to pry into the bedrooms of America so as to pass constitutional muster.

While all the circuit courts which have passed upon this question have uniformly upheld the constitutionality of the statutes in question in the face of similar attack, nevertheless, the better view, it is submitted, is that expressed by this Court in *Berger v. New York*, 388 U. S. 41 (1967), *Katz v. United States*, 389 U. S. 347 (1967) and *Osborne v. United States*, 385 U. S. 323 (1966), which inherently set the parameters of a constitutionally adequate wiretap statute. These cases hold that to be valid a wiretap order must not only be issued by a neutral and detached magistrate acting upon probable cause, but, additionally, the order must particularly describe the offense being investigated, the telephone being tapped and the conversations to be seized. Moreover, the duration of surveillance must be limited so as to cease when the specified conversation has been seized; the order must be executed with dispatch; there must be either notice to the persons being tapped or a showing of exigent circumstances sufficient to excuse notice and there must be a return of the warrant to the magistrate. The petitioners contend that § 2518 goes beyond these constitutionally-mandated boundaries.

The statute permits lengthy, continuous surveillances (up to thirty days) and further permits any number of thirty-day extensions that can be supported by probable cause. The thirty-day period is less than that condemned in *Berger, supra*, but it is not within the standard of "one limited intrusion rather than a series of continuous surveillance" approved by this Court in *Berger* and *Osborne*.

Nor does the statute make adequate provision for the restraint of the officers executing the warrant. Outside of the requirement that the order contain the bland, vague direction that the interception "be conducted in such a way

as to minimize the interception of communications not subject to interception under this chapter," the order need not restrain or guide the officers in the manner of the execution. For the statute to meet the requirements of *Berger, Katz* and *Osborne, supra,* it must require effective, specific, non-discretionary controls on the execution of the order. Otherwise, the determination of the extent of the invasion of privacy is left "to the discretion of the officer executing the warrant" *Marron v. United States,* 275 U. S. 192 (1927). The cumulative effect of the provisions of the statute respecting the duration of the interception, the broad discretion of the officers and the casual, discretionary supervision by the court, is to permit general searches. These have always been illegal. [*Boyd v. United States,* 116 U. S. 616 (1886); *Marron v. United States, supra; Stanford v. United States,* 279 U. S. 476 (1965)].

Moreover, the statute permits these interceptions to be made secretly, although secret searches are not favored under our laws. *Gouled v. United States,* 255 U. S. 298 (1921). The statute does not require disclosure of the wire-tap to the persons affected for ninety days or in some cases even longer. During such an extended period of time memories may fade and in other ways the value of disclosure is lost to the affected persons just by virtue of the passage of time. This Court, in *Berger, supra,* required that there be exigent circumstances to justify this kind of secrecy. The statutory provisions are not in conformity with that requirement.

Additionally, the mandate of the Fourth Amendment applies to an order authorizing the interception of wire and oral communications, as well as to an order authorizing the physical search of a person or his premises. In the District

Court, the government attorney stated in his application for the wiretap order that other investigative procedures utilized by the Federal Bureau of Investigation, including contacts with confidential sources and other law enforcement officers, pertinent record examinations, physical surveillances, and the procedures set forth in the affidavit incorporated by reference into the application, had succeeded in establishing the existence of the "illegal gambling business" being conducted, financed, managed, supervised, directed and owned by the petitioners, and others as yet unknown, but had been unsuccessful in obtaining sufficient evidence to warrant the making of arrests.

This flies right in the face of the basic constitutional mandate relating to searches and seizures in view of the fact that if there exists probable cause to invade a person's privacy in one fashion, there ought to be probable cause to invade that person's privacy in the other, *i.e.*, invading the privacy of his telephone conversations as well as invading the privacy of the premises where the person resides. *Draper v. United States*, 358 U. S. 307 (1959). There should be no distinction between the probable cause necessary to obtain an eavesdrop warrant, a search warrant, or, for that matter, an arrest warrant, in view of the fact that the Fourth Amendment speaks of probable cause necessary to search a person, to seize a person, or, in any other way, to invade a person's privacy. If the probable cause is lacking in one instance, this should be an express admission that it is lacking in the other instances.

Finally, the intercept orders were fatally defective because they were improperly authorized in contravention of Title 18 U. S. C. 2510 *et seq.* In view of the divergence of opinion in the circuit courts on this point and the manner in which the government's affidavits relative to the

authorization procedures are couched in the instant case, the following is submitted.

Section 2516(1) of Title 18 U. S. C. mandates that the Attorney General or Assistant Attorney General "specifically designated" by the Attorney General, may authorize an application for an intercept order.

It is submitted that both the plain meaning of the statute and congressional intent indicate that § 2516 must be read literally and that deviations from the statutory authorization procedure be deemed fatally defective. *United States v. Robinson,* 468 F. 2d 189 (5th Cir. 1972); *United States v. Cihal,* 336 F. Supp. 261 (W. D. Pa. 1972); *United States v. Baldassari,* 338 F. Supp. 904 (M. D. Pa. 1972); *United States v. Aquino,* 338 F. Supp. 1080 (E. D. Mich. 1972); *United States v. Focarile,* 340 F. Supp. 1033 (D. C. Md. 1972); *United States v. Casale,* 341 F. Supp. 374 (M. D. Pa. 1972).

The affidavit of Henry E. Petersen, then a Deputy Assistant Attorney General in the Criminal Justice Division, indicated that the request for the first intercept order was handled by Thomas D. Massie, Esq., and that the second request was initially processed by John W. Sweeney, Esq., members of a "special unit" of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice. Their work product was subsequently reviewed by their immediate superior, Philip T. White, of the "special unit." It is noteworthy that once the request reached Petersen, he "forwarded it to the office of the Attorney General." He made no mention of the Attorney General or a specific individual of the office of the Attorney General. The affidavit subsequently refers to "approval in the office of the Attorney General" as opposed

to the Attorney General or a specific individual in the office of the Attorney General approving same. Since the affidavit does not clearly state it, it is surmised that the purported approval relates to the memoranda dated April 2, 1971, and April 21, 1971, which authorized the then United States Attorney for the Western District of New York, H. Kenneth Schroeder, Jr., to make the applications. Petersen's affidavit then states that he signed Will Wilson's name to the letters sent to H. Kenneth Schroeder, Jr., dated April 2, 1971, and a similar letter dated April 21, 1971, relying on Wilson's previous approval in an unrelated case.

Letters were apparently prepared in accordance with the last paragraph of the inter-office memorandum dated April 2, 1971, and April 21, 1971, which were directed to Will Wilson. It is significant that the memorandum dated April 2, 1971, reflects the following reference initials—"JNM: PTW:skh" Usual and customary secretarial procedures reflect that the initials "skh" are those of the typist, that the initials "PTW" are the individual who did, in fact, prepare and dictate the memorandum in lieu of another individual as indicated by "JNM," namely, John N. Mitchell. Apparently, "PTW" would be Philip T. White, a subordinate of Henry E. Petersen. The memorandum dated April 2, 1971, was from Philip T. White to Henry E. Petersen. At best, the then Attorney General's role in the procedures appears to be nothing more than affixing his initials in a ministerial fashion. In order to implement the intent of Congress, the authorization for the application would require the exercise of cognitive powers, analysis and judgment as opposed to a mere ministerial function; nor is this requirement met by turning to the Assistant Attorney General "specially designated" since the affidavit of Petersen indicates that "Will Wilson did not examine the file"

although the memos purporting to authorize the intercepting applications were addressed in each instance to Will Wilson and the orders of the court in each instance refer expressly to the "application authorized by Will Wilson."

The documents forming the foundation for the second order are subject to the same analysis. The memorandum dated April 21, 1971, reflects no reference initials. However, handwritten changes in the typed memo indicate the initials "JWS," which are the same initials of John W. Sweeney, the subordinate of Philip T. White, in turn, a subordinate of Henry E. Petersen.

It is submitted that the documents referred to above obscure rather than enlighten the authorization procedures used in the lower court.

The issue of whether the authorization procedures were statutorily correct has created a serious conflict among the circuit courts of appeal on substantially identical issues. For example, the court below, in affirming the convictions of the petitioners, had previously held these procedures proper in:

United States v. Pisacano, 459 F. 2d 259, (2d Cir., 1972);
United States v. Becker, 461 F. 2d 230, (2d Cir., 1972);
United States v. Fiorella, 468 F. 2d 688, (2d Cir., 1972).

The Third and Tenth Circuit Courts of Appeal have also upheld these procedures in:

United States v. Ceraso, 467 F. 2d 647, (3rd Cir., 1972);
United States v. Cox, 449 F. 2d 679, (10th Cir., 1971).

However, three other circuits have reversed convictions on identical procedures:

United States v. Robinson, 468 F. 2d 189, (5th Cir., 1972), remanded by the circuit court *en banc* for hearing as to facts surrounding authorization procedures, 472 F. 2d 973, (5th Cir., 1973).

United States v. Giordano, 469 F. 2d 522, (4th Cir., 1972), cert. granted ____ U. S. ____, 36 L. Ed. 2d 194 (1973).

United States v. Chavez, Case No. 72-2240, (9th Cir., 1973), cert. granted May 21, 1973 (not reported yet).

2.) In Establishing Probable Cause For The Issuance Of The Intercept Orders, Reliance Was Had Upon The Statutory Presumption Contained In § 1955 Of Title 18, Which Presumption Is Unconstitutional.

For purposes of probable cause, Paragraph (C) of § 1955 of Title 18 U.S.C. creates a presumption that the statutory requirements of a gross daily revenue of $2,000.00 shall be deemed to have been satisfied, if it is shown that five or more persons conducted a gambling business in violation of state law and that the business has operated for two or more days. This statutory presumption was relied upon in the District Court.

However, in drawing this statutory inference, unless it can at least be said with substantial assurance, that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, the statute is irrational or arbitrary and hence, unconstitutional. *Leary v. United States,* 395 U. S. 6, 35, (1969); *Tot v. United States,* 319 U. S. 463 (1943); *United States v. Gainey,* 380 U. S. 63 (1965); *United States v. Romano,* 382 U. S. 136 (1965).

The statutory presumption of § 1959 becomes operative after it has been established that there is (1) an illegal gambling business, (2) that five or more persons are operating the business, (3) that it has been in operation for two or more successive days. There is no substantial assurance under these circumstances that the presumed fact of a gross in excess of $2,000.00 a day flows from the alleged established facts. There is no rational nexus connecting five or more people and two days of operation to gross revenue in excess of $2,000.00 on one day. Furthermore, the presumed fact is not a matter of common knowledge or empirical data. Therefore, the statutory presumption of § 1955 fails to meet the minimal constitutional requirements of *Leary v. United States, supra, Tot v. United States, supra, United States v. Gainey, supra, United States v. Romano, supra.*

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion in the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 500, 561-66—September Term, 1972.

(Argued January 26, 1973 Decided May 1, 1973.)

Docket No. 72-2017, 72-2054-59

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS R. FINO, ROSALIE L. FINO, JOSEPH M. GIALLELLA, NICHOLAS ALBERTI, ANTHONY J. TRIPI, GAETANO C. AGRO, JOSEPH RANDAZZO,

Appellants.

Before: Moore, Hays and Feinberg, Circuit Judges.

Appeal from convictions entered after a jury trial in the United States District Court for the Western District of New York, John O. Henderson, *Chief Judge,* on a charge of conducting a gambling business in violation of 18 U.S.C. § 1955 (all appellants), and of conspiracy to commit that offense in violation of 18 U.S.C. § 371 (appellants Nicholas and Rosalie Fino, Giallella, Alberti and Tripi).

Affirmed.

Frederick W. Read, III (John T. Elfin, United States Attorney, Buffalo, New York, Sidney M. Glazer, Department of Justice, Washington, D.C., on the brief), for Appellee.

Peter L. Parrino, Buffalo, New York (Parrino and Cooper, Buffalo, New York, on the brief), for Appellants Nicholas R. Fino, Rosalie L. Fino, Joseph M. Giallella, Nicholas Alberti and Anthony J. Tripi.

Joseph D. Bermingham, Jr., Buffalo, New York (Doyle, Diebold & Bermingham, Buffalo, New York, on the brief), for Appellant Joseph Randazzo.

James P. Renda, Buffalo, New York, for Appellant Gaetano C. Agro.

HAYS, Circuit Judge:

These are appeals from convictions entered after a trial by jury in the United States District Court for the Western District of New York on charges of conducting a gambling business in violation of 18 U.S.C. § 1955 and of conspiracy to commit that offense in violation of 18 U.S.C. § 371. All the appellants were convicted on the substantive count and all but Agro and Randazzo on the conspiracy count.

Nicholas Fino was sentenced to concurrent terms of three years and to fines totaling $30,000; Rosalie Fino and Agro to two years probation; Giallella, Alberti, Randazzo and Tripi to 18 months imprisonment and, in the case of Agro and Tripi, to fines respectively of $5,000 and $10,000

Opinion in the Court Below.

Most of the relevant facts are undisputed. Nicholas Fino supervised a large-scale gambling operation in the Buffalo, New York area. The location of the betting office to which "writers" who accepted bets on horse races telephoned their bets changed frequently. At one time it was at the home of Agro and at a later time at the home of Nicholas Fino. Giallella, Tripi and Rosalie Fino took bets over the betting office telephones from the "writers" who reported the bets in code. Fino, Alberti, Tripi and Randazzo from time to time computed the balances in the accounts of the individual "writers."

Much of the evidence against the appellants consisted of recordings of conversations overheard in the course of court-authorized wiretaps.

The appellants contend (1) that the use of the wiretap evidence was improper in several respects; (2) that 18 U.S.C. § 1955 is unconstitutional; (3) that the court erred in permitting the jury to consider events occurring before the effective date of 18 U.S.C. § 1955; (4) that the court erred in submitting both counts of the indictment to the jury; (5) that the court erred in its charge to the jury by defining the word "conduct" too broadly; and (6) that the convictions of Agro and Randazzo were "contrary to law and against the weight of the evidence."

(1) The Wiretaps.

Appellants' first contention with respect to the wiretap evidence is that Section 2518 of Title 18, authorizing court-approved wiretaps, is unconstitutional In *United States* v. *Tortorello*, ____ F.2d ____ (2d Cir. 1973) this Court upheld the constitutionality of that statute. In the *Tortorello* case the court ruled specifically on each of the areas which these appellants challenge the statute, particularly

notice and duration and found no constitutional def
See also *United States* v. *Cox,* 449 F.2d 679 (10th
1971), cert. denied, 406 U.S. 934 (1972); *United State*
Cox, 462 F.2d 1293 (8th Cir. 1972); *United States* v. *Caf*
____ F.2d ____ (3d Cir. 1973).

Appellants also argue that § 2518 (c) creates an uncon
tutional presumption. That section states that if a g
bling operation is shown to have had five or more pers
involved in conducting it in violation of state law and
operated for two or more days then for the purpose
probable cause for the issuance of warrants, the statut
requirement of a gross daily revenue of $2000 shall
deemed to have been satisfied. We would uphold that
sumption for the purposes of probable cause, see *Un*
States v. *Palmer,* 465 F.2d 697, 699 (6th Cir. 1972),
denied (October 10, 1972), but even without it there
abundant evidence to establish the probable cause requ
for the issuance of the orders in this case.

Appellants' argument with respect to probable c
for the issuance of the wiretap orders is not directed at
factual basis for the issuance of these orders. The f
alleged were, as we have said, abundantly sufficient to
tify the orders. When appellants seek to attack is the st
tory provision that requires "a full and complete state
as to whether or not other investigative procedures
been tried and failed or why they reasonably appear t
unlikely to succeed if tried or to be too dangerous." Ap
lants argue that the facts presented in the affidavit
which the wiretap orders were based try to show
there was insufficient basis for the issuance of a se
warrant. By reason of this showing, say the appell

the government having conceded the absence of pro
cause for one type of search, cannot claim the existen
probable cause for another type, *i.e.*, the wiretap.
ever the appellants' conclusion does not follow from
premises. It is entirely reasonable to require, as the
ute does, that the government show its reasons fo
proceeding by way of search warrants without therel
tablishing the absence of probable cause for a wi
This is exactly what the government did in the pr
case.

Appellants' objections to the procedure employed b
Department of Justice for authorizing the wiretap
fail. See *United States* v. *Pisacano*, 259 F.2d 250 (2
1972); *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1
United States v. *Fiorella*, ____ F.2d ____ (2d Cir.

Appellants urge that the wiretap orders con
broader powers than are authorized by the minimi
requirements of 18 U.S.C. § 2518, and that the age
executing the wiretaps exceeded the limits imposed
orders. As to the scope of the orders the appellants'
pal point is that the orders did not specify in deta
exact methods the agents should use in minimizing
ception of communications of which the interceptio
not authorized. The orders did in fact contain a co
able amount of specification (for example as to ho
the day when the telephones could be tapped). App
do not suggest what additional specification shoul
been included. As the government points out it was
sible for the court to provide detailed definitions
types of conversations which should be intercepted
the exact contents of the conversations could har
known in advance of listening to them at least in

Under these circumstances general instructions on minimization are to be considered as compliance with Section 2518.

The nature of the appellants' objections to the alleged failure of the agents to observe the minimization limitations imposed by the orders can be gathered from the appellants' claim that incoming calls were monitored under the first of the wiretap orders although that order authorized the tapping of outgoing calls only. Examination of the order and the papers on which it was based demonstrates clearly that the order contemplated tapping of incoming as well as outgoing calls, as, in common sense it must have done, with respect to a gambling operation of the type here involved.

Appellants claim that many telephone calls having nothing to do with gambling operations were monitored by the agents. The figures show, however, that only a very small proportion of the recorded calls (about two percent) were not concerned with gambling. We accept the finding of the district court that "the evidence established a good faith effort on the part of the monitoring agents to discontinue all calls believed to be of a non-pertinent nature."

(2) Constitutionality of Section 1955.

This court has ruled that Congress did not exceed its constitutional authority under the Commerce Clause in enacting Section 1955. *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972). See also *United States* v. *Riehl*, 460 F.2d 454 (3d Cir. 1972); *United States* v. *Harris*, 460 F.2d 1041 (5th Cir. 1972), cert. denied, October 10, 1972; and *United States* v. *Schneider*, 459 F.2d 540 (8th Cir. 1972), cert. denied, 41 U.S.L.W. 3187 (Oct. 10, 1972).

(3) The Ex Post Facto Claim.

Appellants' contention that the admission of certain evidence relating to events prior to the effective date of 18 U.S.C. § 1955 constitutes a violation of the *ex post facto* clause of the Constitution is without merit. Evidence of behavior antedating the adoption of the statute was admissible as bearing on the existence and purpose of the conspiracy and the significance of later behavior. See *United States* v. *Smith*, 464 F.2d 1129, 1133 (2d Cir. 1972). The district court received the testimony subject to an entirely appropriate limiting instruction.

(4) Submission of Both Substantive and Conspiracy Counts to the Jury.

The contention that it is error to submit to the jury counts under both 18 U.S.C. § 371 and § 1955 was raised and rejected by this court in *United States* v. *Becker*, *supra*, where the court said, at p. 234:

> "as long as the conspiratorial concert of action and the substantive offense underlying it are not coterminous and fewer participants are required for the commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment."

(5) Definition of "conduct" in the Trial Court's Charge to the Jury.

The trial court's definition of "conduct" in its charge to the jury was entirely correct. See *United States* v. *Becker, supra.*

(6) Sufficiency of the Evidence as to Agro and Randazzo.

The evidence against Agro and Randazzo was sufficient to support their convictions.

The evidence showed that the betting office was operated at Agro's house during a part of the period covered by the indictment. There was evidence based on monitored calls that on at least two occasions Agro accepted bets over the telephone listed in his name.

The evidence against Randazzo showed that on at least two occasions he did the computations at the weekly accounting of the "writers."

Since we find no infirmity in the convictions, we affirm.

[On May 10, 1973, an application for a stay of the mandate of the Circuit Court of Appeals for the Second Circuit was sent to that Court and as of this date an order has not been received granting the application for the stay. On May 24, 1973, in a telephone conversation with one of the deputy clerks of the Court of Appeals, no opposition to the application for the stay of the mandate had been received by the court and it is not anticipated that the mandate will not be stayed.]

APPENDIX B

Constitutional Provisions

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX C

Statutes Involved

United States Code, Title 18

§ 1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeiture; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection

(c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity. (Oct. 15, 1970, P. L. 91-452, Title VIII, Part C, § 803(a), 84 Stat. 937.)

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots) [§§ 791-800, 2151-2157, 2381-2391 or 2101, 2102 of this title];

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions

on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buy-

ing, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communication by investigative or law enforcement having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. (June 19, 1968, P. L. 90-351, Title III, Sec. 802, 82 Stat. 216; Oct. 15, 1970, P. L. 91-452, Titles VIII, IX, XI, Sec's. 810, 902(a) 1103, 84 Stat. 940, 947, 959; Jan. 2, 1971, P. L. 91-644, Title IV, Sec. 16, 84 Stat. 1891.)

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for

interception should not automatically terminate whe
the described type of communication has been first ob
tained, a particular description of facts establishin
probable cause to believe that additional communica
tions of the same type will occur thereafter;

(e) a full and complete statement of the facts co
cerning all previous applications known to the ind
vidual authorizing and making the application, mad
to any judge for authorization to intercept, or fo
approval of interceptions of, wire or oral communica
tions involving any of the same persons, facilities o
places specified in the application, and the action take
by the judge on each such application; and

(f) where the application is for the extension o
an order, a statement setting forth the results th
far obtained from the interception, or a reasonab
explanation of the failure to obtain such results.

(2) The judge may require the applicant to furni
additional testimony or documentary evidence in support
the application.

(3) Upon such application the judge may enter an
parte order, as requested or as modified, authorizing
approving interception of wire or oral communicatio
within the territorial jurisdiction of the court in which t
judge is sitting, if the judge determines on the basis of t
facts submitted by the applicant that—

(a) there is probable cause for belief that an in
vidual is committing, has committed, or is about
commit a particular offense enumerated in section 25
of this chapter;

(b) there is probable cause for belief that particul communications concerning that offense will be o tained through such interception;

(c) normal investigative procedures have been tri and have failed or reasonably appear to be unlikely succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the fac ities from which, or the place where, the wire or or communications are to be intercepted are being use or are about to be used, in connection with the co mission of such offense, or are leased to, listed in t name of, or commonly used by such person.

(4) Each order authorizing or approving the interce tion of any wire or oral communication shall specify—

(a) the identity of the person, if known, who communications are to be intercepted;

(b) the nature and location of the communicatio facilities as to which, or the place where, authority intercept is granted;

(c) a particular description of the type of commu cation sought to be intercepted, and a statement of t particular offense to which it relates;

(d) the identity of the agency authorized to int cept the communications, and of the person authorizi the application; and

(e) the period of time during which such interc tion is authorized, including a statement as to whet or not the interception shall automatically termin when the described communication has been first tained.

(5) No order entered under this section may autho
or approve the interception of any wire or oral commun
tion for any period longer than is necessary to achieve
objective of the authorization, nor in any event longer t
thirty days. Extensions of an order may be granted,
only upon application for an extension made in accorda
with subsection (1) of this section and the court mal
the findings required by subsection (3) of this section.
period of extension shall be no longer than the authori
judge deems necessary to achieve the purposes for w
it was granted and in no event for longer than thirty d
Every order and extension thereof shall contain a provi
that the authorization to intercept shall be executed as
as practicable, shall be conducted in such a way as to m
mize the interception of communications not otherwise
ject to interception under this chapter, and must termi
upon attainment of the authorized objective, or in any e
in thirty days.

(6) Whenever an order authorizing interception i
tered pursuant to this chapter, the order may re
reports to be made to the judge who issued the order s
ing what progress has been made toward achievemer
the authorized objective and the need for continued i
ception. Such reports shall be made at such interva
the judge may require.

(7) Notwithstanding any other provision of this
ter, any investigative or law enforcement officer, spe
designated by the Attorney General or by the prin
prosecuting attorney of any State or subdivision th
acting pursuant to a statute of that State, who reaso
determines that—

(a) an emergency situation exists with respec conspiratorial activities threatening the national curity interest or to conspiratorial activities charac istic of organized crime that requires a wire or communication to be intercepted before an order thorizing such interception can with due diligenc obtained, and

(b) there are grounds upon which an order coul entered under this chapter to authorize such inter tion,

may intercept such wire or oral communication if an plication for an order approving the interception is mad accordance with this section within forty-eight hours a the interception has occurred, or begins to occur. In absence of an order, such interception shall immedi terminate when the communication sought is obtaine when the application for the order is denied, which is earlier. In the event such application for approv denied, or in any other case where the interception is minated without an order having been issued, the con of any wire or oral communication intercepted sha treated as having been obtained in violation of this cha and an inventory shall be served as provided for in su tion (d) of this section on the person named in the app tion.

(8)(a) The contents of any wire or oral communic intercepted by any means authorized by this chapter if possible, be recorded on tape or wire or other parable evidence. The recording of the contents of any or oral communication under this subsection shall be in such way as will protect the recording from editi

other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the

persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an *ex parte* showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or deny-

ing such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted. (June 19, 1968, P. L. 90-351, Title III, Sec. 802, 82 Stat. 218; July 29, 1970, P. L. 91-358, Title II, Sec. 211(b), 84 Stat. 654.)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1605

NICHOLAS R. FINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR TBE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the constitutionality on its face of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), and contend that, in any event, proper procedures were not followed within the Department of Justice for authorizing the submission to the court of an application for a wiretap order; they further contend that the wiretap order was based on an unconstitutional presumption.

An indictment returned in the Western District of New York charged that petitioners conducted a gambling business in violation of 18 U.S.C. 1955 (count 2) and conspired with six unindicted co-conspirators to commit that offense, in violation of 18 U.S.C. 371 (count 1). After a jury trial, petitioners Agro and Randazzo were convicted on count 2; the other petitioners were

convicted on both counts.[1] Nicholas Fino received
current sentences of imprisonment for three year
each count and was fined $30,000. Giallella, All
and Tripi received concurrent sentences of imprison
for eighteen months on each count. In addition,
was fined $5,000 on each count. Randazzo was sente
to imprisonment for eighteen months and fined $5
Rosalie Fino and Agro received suspended sent
and were placed on probation for two years. The
of appeals affirmed (Pet. App. A).

Evidence at trial included information obtained
court-ordered wiretaps placed on telephones at
residences of petitioners Nicholas Fino and Agro
unindicted co-conspirator Angela Tomaselli.

1. Petitioners challenge the constitutionality of
presumption for warrant purposes contained in
U.S.C. 1955(c) regarding the volume of revenues
gambling enterprise.[2] They argue that the district c

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[1] One defendant was acquitted and another, now deceased
also convicted only on count 2.

[2] 18 U.S.C. 1955(a) makes it a federal offense to co
an "illegal gambling business", defined in subsection (b)
gambling business which is in violation of state law, in
five or more persons, and "has been or remains in substa
continuous operation for a period in excess of thirty da
has a gross revenue of $2,000 in any single day."

18 U.S.C. 1955(c) then provides:

"If five or more persons conduct, finance, manage, supe
direct, or own all or part of a gambling business and
business operates for two or more successive days, then, f
purpose of obtaining warrants for arrests, interceptions, and
searches and seizure, probable cause that the business r
gross revenues in excess of $2,000 in any single day sh
deemed to have been established."

in authorizing the wiretaps, relied upon that presumption and that this violated their Fourth ment rights to have a court make an independ finding judgment before issuing a warrant. Bu district judge who issued the wiretap orders a on the appellants' suppression motion noted in his "there is no indication either in the application of authorization indicating that the presump relied upon" (A. 84).[3] Indeed, as the court o held, the affidavits for the wiretap orders show cause that the business had been in continuous for a period in excess of thirty days.[4]

In any event, the presumption is constitutio brief in opposition in *Palmer* v. *United States,* certiorari denied, 409 U.S. 874, sets forth th why Section 1955 has been properly uphel claims of constitutional infirmity like those tioners here.[5] We there point out that the authorized by the statute was based upon able determination by Congress following

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[3] "A." refers to the appendix to petitioners' br court of appeals, which we are lodging with the Cl Court.

[4] For example, an F.B.I. agent's affidavit for the showed that surveillance was conducted on the gamblin from October 1970 until March 16, 1971 (A. 40). T recited how confidential informants had provided info this operation during the preceding year and had g of its operation which covered most of the month 1971 (A. 27-46).

[5] We are providing petitioners' counsel with a c *Palmer* brief. See also *United States* v. *Harris,* 460 (C.A. 5), certiorari denied, 409 U.S. 877; *United Sta* 460 F. 2d 454 (C.A. 3); *DiMario* v. *United Stat* 6353, certiorari denied, May 21, 1973.

hearings; that the statute does not usurp the function of the magistrate, since he still must determine in each particular case whether the essential facts giving rise to the inference are present; and that it would be inappropriate to strike down a reasonable presumption establishing probable cause for issuance of warrants that would be upheld if utilized for the purpose of establishing guilt (see our brief in *Palmer,* pp. 5-7).

2. Petitioners argue that the wiretap statute, 18 U.S.C. 2510-2520, is unconstitutional on its face. The court of appeals, in rejecting petitioners' attack on the constitutionality of the wiretap statute, cited its opinion in *United States* v. *Tortorello,* (No. 72-1957, C.A. 2, decided April 5, 1973, pending on petition for a writ of certiorari, No. 72-1703), upon which we principally rely here. We note that similar attacks on the wiretap authorization statute have been rejected by every other court of appeals which has ruled on the constitutionality of the statute. See *United States* v. *Whitaker,* 474 F. 2d 1246 (C.A. 3), certiorari denied, No. 73-1317, June 18, 1973; *United States* v. *Bobo,* (No. 71-2077, C.A. 4, decided April 23, 1973); *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278; *United States* v. *Cox,* 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.

3. Petitioners also object to the Department of Justice's internal procedures (which have now been revised) for authorizing the application for the wiretap order. In the present case, government affidavits filed in the district court showed that the application for the wiretap order involved here was personally authorized by then Attorney General John N. Mitchell, after it had been processed through the standard procedures within the Department of Justice as set forth

in detail in our petition for certiorari and in our br in *United States* v. *Giordano,* No. 72-1057, certior granted, March 26, 1973. Whether that proced comports with the requirements of 18 U.S.C. 2516 is an issue now pending before this Court in *Uni States* v. *Giordano, supra,* and *United States* v. *Chav* No. 72-1319, certiorari granted, May 21, 1973.[6]

The Court may therefore wish to defer disposition the present petition pending its decision in *Giord* and *Chavez.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[6] We are providing petitioners' counsel with a copy of our b in *Giordano* and *Chavez.*